



STATE OF INDIANA

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December 11, 2012

Mr. Gabriel Harden
1130 N. Livingston Avenue
Indianapolis, Indiana 46222

Re: Formal Complaint 12-FC-333; Alleged Violation of the Access to Public Records Act by the Indiana Family and Social Services Administration

Dear Mr. Harden:

This advisory opinion is in response to your formal complaint alleging the Indiana Family and Social Services Administration ("FSSA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Kelly J. Greene, Attorney, responded on behalf of the FSSA. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on July 18, 2012, you submitted a written request, via certified mail, to the FSSA for copies of public records which had previously been sent to you on a compact disc to the Federal Detention Center in Miami, Florida, but were returned to the FSSA as undeliverable. You further allege that the FSSA on multiple occasions has denied your request for a copy of the disc that it had previously attempted to provide as well as certain other records regarding Dental Express.

In response to your formal complaint, Ms. Greene advised that all records responsive to your request have been provided. As a way of background, Ms. Greene provided that you have submitted a number of public records requests to the FSSA over the past two years. On June 20, 2012, you submitted a request to the FSSA for "copies of all public records in my company's file including but not limited to provider agreements, documented provider telephone conversations, Letters from Dental Express's Billing Administrators Lisa Broome and Ruth Vazquez-Gunzburger, all communications from any Dental Express personnel (i.e. Keli Neal or any other staff member associated with this provider), and documented correspondence concerning Gabriel Harden and/or Dental Express, LLC, Dental Express, Inc." On June 26, 2012, FSSA responded to your request and provided that the request failed to identify the records sought with reasonable particularity. FSSA offered to work with you in order to identify the specific records that would be responsive to your request.

On June 28, 2012, a phone conversation was conducted between you and the FSSA during which your request was further defined. After understanding the scope of your request, FSSA sent you written correspondence on July 9, 2012 summarizing the conversation that occurred. On July 5, 2012, you submitted correspondence to the FSSA that expanded the dates of the request to 2000 through 2012. FSSA acknowledged your letter in a written response, dated July 11, 2012. On July 28, 2012, you submitted further correspondence seeking a copy of a computer disc that the FSSA initially attempted to send you at the Federal Detention Center in Miami, Florida on April 11, 2011. On July 26, 2012, FSSA acknowledged the receipt of your request in writing.

On July 31, 2012, the FSSA sent your further written correspondence along with copies of over 100 records that were included on the computer disc originally sent to you on April 11, 2011. Hard copies were provided in lieu of a disc due to technical difficulties with redacting confidential information. On September 28, 2012, the FSSA sent you written correspondence along with a computer disc containing all records that had been located in response to your request. In response to your subsequent allegations that the FSSA had failed to provide all records, the FSSA again advised that that all records have been provided. Ms. Greene would argue that the FSSA has not denied your request for records or failed to produce any records in its possession that were responsive to your request. The agency can only produce records that it maintains in its possession and the specific records you are looking for do not exist.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The FSSA is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the FSSA’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. In response to your requests, the FSSA responded in writing within seven (7) days of receipt. Thus, it is my opinion that the FSSA complied with section 9(b) of the APRA in response to your requests.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. Here, the FSSA has provided that you have received copies of all records that are responsive to your requests, including records that the agency previously attempted to provide to you in April of 2011. To the extent you challenge the FSSA’s claim that all records have been provided, I would note that the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. See *Opinion of the Public Access Counselor 11-FC-80*. As such, it is my opinion that the FSSA did not violate the APRA if all records that were responsive to your requests have been provided.

CONCLUSION

Based on the foregoing, it is my opinion that the FSSA did not violate the APRA if all records that were responsive to your requests have been provided.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive, flowing style.

Joseph B. Hoage
Public Access Counselor

cc: Kelley J. Greene